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No. 03-1083

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In The

Supreme Court of the United States

ST. VINCENT MEDICAL CENTER; DAUGHTERS OF CHARITY HEALTH SYSTEMS INC.,

Petitioners,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION; SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 399,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

STATEMENT

In this case, the United States District Court for the Northern District of California was specifically asked by the Respondents SEIU to issue an order compelling Petitioner St. Vincent "*to arbitrate the dispute regarding the SEIU's objections to the September 26 and 27, 2001 [NLRB conducted] election*" (ER 5, emphasis added). Ruling on the complaint to compel before it, the U.S. District Court properly found that the issue presented by the complaint was a representational issue that fell within the primary jurisdiction of the NLRB. Pet. 22a-24a.

Although the SEIU's complaint to compel arbitration, by its own terms, was expressly directed at "*objections to the September 26 and 27, 2001 election,*" the SEIU on appeal sought to engage in a revisionist recasting of its complaint to assert that it merely desired to have a private arbitrator rule on whether certain alleged *pre*-election conduct violated the parties' contractual agreement. Although it cannot seriously be disputed that "objections to an election" by definition challenge the validity of the results of an election, the Ninth Circuit Court of Appeals in a footnote in its Opinion reversing the District Court noted that "it appears" the SEIU is not objecting to the result of the election since the "objections ... consisted of a series of allegations [the Employer] violated the Agreement." Pet.19a n.7. Seizing on this footnote reference, the SEIU principally argues in its opposition brief that no representational issue is raised by their complaint to compel arbitration of election "objections." However, contrary to the Ninth Circuit's mistaken view, even where based on alleged violations of a private contractual agreement, "objections" to an election necessarily raise a representational issue within the NLRB's exclusive primary jurisdiction. Thus, the principal argument raised by the

SEIU in opposition to certiorari is groundless, and exemplifies the need for this Court's intervention to clarify and reaffirm what had been commonly understood before the Ninth Circuit's ruling – that deciding "objections" to an NLRB election is a matter peculiarly within the NLRB's special administrative expertise and primary jurisdiction.

The other assertions raised by the SEIU in opposition to the petition for certiorari are equally without merit. The SEIU argues that the Ninth Circuit's opinion conflicts with no other court ruling, but it can only make that argument by ignoring many of the cases cited in the Petition. Indeed, the opposition reveals a deeper division among the circuits than the Ninth Circuit's ruling alone. The opposition next argues that any remedy an arbitrator might issue in deciding the union's untimely election objections is irrelevant. This, however, begs the fundamental question of whether an arbitrator should be permitted at all to consider belated election objections to an NLRB-conducted election proceeding that has long been certified and closed. Finally, the SEIU argues the NLRB's Stipulated Election Agreement and the NLRB's Rules and Regulations requiring that election objections be brought before the NLRB can supposedly be avoided simply by a party bringing a wholly collateral arbitral proceeding in disregard of those legal obligations. This argument plainly fails as a matter a circular logic.

ARGUMENT

1. The SEIU devotes much of its brief to repeatedly asserting that it was not seeking to compel arbitration of any challenge to the NLRB-conducted election in this case that resulted in the SEIU being denied certification as the employees' collective bargaining representative. However, the SEIU does not and cannot dispute that the bringing of "*objections*" after an NLRB election has been held is the

procedure by which a party challenges the validity of the results of the election. As the NLRB has stated: "The validity of an election may be questioned by filing objections to the conduct of an election or to conduct affecting the results of an election. ... Objections may have the effect of invalidating an election. If this occurs, the election may be 'rerun'..." Office of the NLRB General Counsel, *An Outline of Law & Procedure in Representation Cases* §22-116 (1999).

The SEIU's complaint before the U.S. District Court expressly sought an order compelling Petitioner "to arbitrate the dispute regarding the SEIU's *objections to the September 26 and 27, 2001 election*" (ER 5, emphasis added). The complaint did *not* state, as the SEIU claimed for the first time before the Ninth Circuit and as it would now have this Court believe, that the union was simply seeking arbitration of alleged pre-election contractual violations that had no claimed impact on the election. On the contrary, the complaint to compel arbitration specifically stated that "following the election, in accordance with Section II.E.16 of the Agreement, the Union filed objections to the election" consisting of allegations that the Employer violated the Agreement. (ER 4 ¶ 14). Section II.E.16 of the parties' Agreement states:

> **Recognition:** The Employer agrees to recognize the Union as the collective bargaining agent on behalf of employees in any appropriate unit at facilities where a majority of employees voting, vote for union representation, subject to the decision of the Arbitrator or Election officer resolving any outstanding objections to the election. Such objections must be filed by either party within three working days of the election. Upon certification of the Union as the collective bargaining representative, the

> parties will immediately commence good faith negotiations over the applicable contract..."

(ER 8-9). As the SEIU's own complaint admits that the election objections in this case were expressly brought pursuant to a "*recognition*" clause under which objections are raised as an integral part of the process of deciding whether there should be a "certification of the Union as the employees' collective bargaining representative," it plainly shows that the Ninth Circuit was incorrect when it found that the SEIU's objections to the election "raise no representational issue" (Pet.App.16a). It also gives proof to the wholly revisionist nature of the SEIU's current assertion that the objections it seeks to arbitrate were supposedly "not" directed to the result of the election denying it certification as the employees collective bargaining representative.

The Ninth Circuit's holding that the SEIU's objections did not raise a representational issue merely because they were based on alleged *pre*-election conduct erroneously applies, and thus undermines, previously established law. Objections to an election can either challenge the "conduct of an election" itself (e.g., that the election was not held at the designated times, that election campaigning was permitted to occur in the voting area), or "conduct affecting the result of the election" (e.g., a claim as in the this case that the election was impermissibly tainted by alleged wrongful pre-election conduct by one of the parties). See 29 C.F.R. § 102.69(a). As was again discussed more fully in Petition (Pet. 15-16), objections challenging the result of an election may be based on pre-election conduct allegedly in violation of a private agreement between the parties regulating such conduct. *Tyler Pipe Industries, Inc.*, 180 NLRB 880, 881, 890 (1970). The SEIU's opposition brief cites no case authority to the contrary.

Thus, the mere fact the SEIU's objections were based on alleged violations of a private agreement's rules regarding pre-election conduct, does *not* make those alleged violations *when brought as "objections" to an NLRB-conducted election* any less of a matter for the NLRB to decide under the "primary jurisdiction" rule that is at the heart of this case. The Ninth Circuit's holding as described by the SEIU, that without qualification or exception, "when allegations in a motion to compel arbitration concern contractual violations of a private agreement, a district court must enforce the agreement to arbitrate so long as the arbitration clause covers the asserted dispute" (Opp. 4), shows the overbroad and flawed nature of that holding. When brought as *objections* to an NLRB-conducted election, violations of a private agreement's rules regarding pre-election conduct remain a matter within the NLRB's primary jurisdiction.

The U.S. District court correctly interpreted the SEIU's complaint before it as being one to compel private arbitration of *election objections* brought as part of the "recognition" process to determine whether the SEIU should be certified as the employees' bargaining representative. The SEIU's appellate recharacterization cannot insulate from review the Ninth Circuit's erroneous holding permitting such a "representational issue" to be decided by an arbitrator rather than the NLRB. This Court should redress that error.

2. The SEIU in its opposition brief does not address, because it cannot contest, the fact that this Court and, until recently, all the other circuit courts of appeals have uniformly recognized that the determination of "*election objections*" is uniquely a matter of an administrative nature within the NLRB's special expertise. *See*, *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *NLRB v. Southern Health Corp.*, 514 F.2d 1121, 1123-1124 (7th Cir. 1975) and

NLRB v. Dixie Lime & Stone Co., 737 F.2d 1556, 1559 (11th Cir. 1984). Nor does the SEIU dispute that this Court has also unambiguously declared that under the "primary jurisdiction" doctrine, federal administrative agencies such as the NLRB may *not* be bypassed where the matter at issue requires just such an exercise of administrative expertise. *International Bhd. of Boilermakers [etc.] v. Hardeman*, 401 U.S. 233, 238 (1971). Instead of directly responding to the conflict between the Ninth Circuit's Opinion below and these earlier rulings as shown in the Petition (Pet. 12-17), the SEIU instead tries to point to another recent appellate court ruling, *New York Health and Human Serv. Union, 1199/SEIU v. NYU Hospitals Center*, 343 F.3d 117 (2d Cir. 2003) ("*NYU*"), which it asserts is supposedly "on all fours" with the case at the bar (Opp. 6). In the *NYU* case, the second circuit did approve private arbitration of election objections to an NLRB-conducted election, but as is case with the Ninth Circuit's ruling below, the *NYU* decision also does not try to address, let alone resolve, the conflict between its ruling and the earlier decisions of this Court and the other circuit courts holding that the resolution of election objections requires the application of special administrative expertise which prohibits a bypass of the NLRB. If anything, the *NYU* ruling shows an even greater split between the circuits, and a more compelling need for this Court's intervention to clarify the law in this area.

Moreover, the *NYU* case is far from being "on all fours" with the case at the bar. In the *NYU* case, the parties' private agreement permitted arbitral review of election objections (violations of rules of conduct asserted to have affected the outcome of the election) only if such objections were also filed with and still *pending* before the NLRB. Then, depending on the arbitrator's award, there would either be a party stipulation for a re-run NLRB election or a voluntary withdrawal of the objections before the Board.

Nothing in the private agreement in the *NYU* case, or in the *NYU* court's opinion, permitted an arbitrator to rule on election objections after the NLRB had *already certified* the results of the NLRB election – as will be allowed here under the Ninth Circuit's ruling. As shown in the Petition (Pet.21-24), to permit such a collateral attack on an already decided and closed NLRB election proceeding undermines federal labor policy by creating intolerable industrial instability. *NLRB v. Reliance Steel Products Co.*, 322 F.2d 49, 55 (5th Cir. 1963).

3. The SEIU's opposition next argues that this Court should ignore the Ninth Circuit's ruling allowing an arbitrator to rule on belated election objections after the NLRB has already certified the results of the election because, according to the SEIU, the arbitrator might issue only a limited remedy (Opp. 8-10). However, the issue is not whether an arbitral remedy other than a re-run election is even possible where the arbitrator is being asked to rule on alleged *election objections*, but rather should a private arbitrator be permitted to even *consider* belated election objections to an NLRB-conducted election proceeding that has long been certified and closed. Permitting an arbitrator to independently evaluate and rule on untimely election objections to an NLRB-conducted election, even assuming the arbitrator were to issue *no* remedy, still improperly undermines the finality of the Board's proceedings. As the NLRB has already certified that the outcome of the September 2001 election was entirely proper, there is nothing left for an arbitrator to consider in the form of election objections. Again as stated in *Iowa Elec. Light & Power Co.*, 668 F.2d 413, 419 n. 11 (8th Cir. 1982), "[w]hen the Board issues an order determining the dispositive representational issue, no contractual issues remain to be decided through arbitration or bargaining." The Ninth Circuit's opinion erroneously permits a wholly collateral proceeding under which an arbitrator can ultimately decide

election objections long *after* the NLRB has already certified the results of the election and closed the representation proceeding.

4. Finally, the SEIU in its opposition (Opp. 10-11) again tries to cite to the *NYU* case for the broad proposition that permitting an arbitrator to decide objections to an NLRB conducted election does not violate the binding nature of the NLRB's Stipulated Election Agreement ("SEA") that requires all post-election proceedings comply with the Board's rules and regulations. The *NYU* case, however, once again presented a different factual situation than exists here. Under the private agreement in the *NYU* case, election objections had to still be timely filed with the NLRB in accord with the Board's rules and regulations, to ultimately be followed (depending on the arbitrator's findings) by either a party stipulation for an NLRB re-run election or a voluntary withdrawal of the objections pending before the NLRB. Nothing in the NLRB's rules and regulations or the terms of the Board's SEA requiring compliance with those rules and regulations prohibit either a stipulated re-run election or a withdrawal of pending objections as provided in the NYU agreement. *See e.g.*, *Pontiac Ostepathic Hosp.*, 336 NLRB 1021, 1026 (2001) (recognizing an employer and unions have the ability to stipulate to a re-run election) and *K-Mart Corp.*, 336 NLRB 455, 457 (2001) (recognizing a party's ability to withdraw its pending election objections). Here, in comparison, the Ninth Circuit's opinion ignores that *both* the parties' agreement and the SEA expressly require compliance with the Board's rules and regulations that, in turn, require that post-election objections be timely filed with the *NLRB* (see Pet. 19 n. 15), which was admittedly *never done* in this case. The SEIU admits that had it filed its election objections with the NLRB in compliance with requirements of the SEA that the Board's Rules and Regulations would apply, but asserts that since it did *not* comply with the SEA, the

Board's Rules and Regulations are inapplicable. Opp. 11. The SEIU's opposition thus postulates the clearly flawed and circular proposition that a party can effectively avoid its legal obligations simply by failing to comply with them.

In sum, despite the SEIU's revisionist claims, the Ninth Circuit's decision below conflicts with the "primary jurisdiction" doctrine as previously enunciated by this Court and other courts of appeals recognizing that the resolution of NLRB *election objections* requires application of the NLRB's special administrative expertise. The Ninth Circuit's decision further undermines the NLRB's election processes and fosters industrial instability by disregarding a binding NLRB Stipulated Election Agreement and permitting a wholly collateral attack on a previously decided and long closed NLRB representation proceeding. It is imperative that this Court clarify the proper role of the NLRB versus an arbitrator in the resolution of election objections to an NLRB-conducted election.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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